RECORD AND BRIEFS

FILED
JUN 27 2017
OFFICE OF THE CLERK
SUPREME COURT U.S.

No. 16-499

IN THE

# Supreme Court of the United States

JOSEPH JESNER, *et. al.*,

*Petitioners,*

v.

ARAB BANK, PLC,

*Respondent.*

*On Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## BRIEF OF *AMICUS CURIAE* EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PETITIONERS

RICHARD L. HERZ
*Counsel of Record*
MARCO B. SIMONS
MARYUM JORDAN
TAMARA MORGENTHAU
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Ste. 401, Washington, DC 20006
(202) 466-5188
rick@earthrights.org
*Counsel for amicus curiae*

## QUESTION PRESENTED

The Question Presented in Petitioners' petition for certiorari is: "Whether the Alien Tort Statute, 28 U.S.C. § 1350, categorically forecloses corporate liability."

*Amicus* shows that the appropriate body of law to apply to the question of whether corporations can be sued under the Alien Tort Statute (ATS), is federal common law. Under that body of law, corporations may be held civilly liable for violations of certain international law norms.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

IDENTITY AND INTEREST OF *AMICUS CURIAE* .. 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 6

I. This Court has accepted that corporations can be sued ..... 6

II. Federal common law governs the issue of whether corporations can be sued under the ATS. .. 7

A. The text of the ATS, *Sosa*, the ordinary role of federal common law and the purpose of the ATS all direct the court to federal common law ..... 8

1. The text of the ATS requires that federal common law governs. ..... 8

2. *Sosa* directs courts to apply federal common law ..... 9

3. Courts generally look to federal liability rules to effectuate federal causes of action ..... 13

4. Congress' original purpose of providing a federal forum suggests that who can be sued must be determined by common law rules ..... 14

B. International law itself compels the conclusion that federal common law applies. ..... 16

III. Federal common law provides for corporate liability. ..... 19

A. The ATS should employ a uniform federal rule based on traditional common law principles. ..... 20

B. Under federal common law, corporations are subject to the same liability rules as natural persons. ..... 21

C. Corporate liability best effectuates the Framers' purposes in passing the ATS. ..... 24

IV. The *mens rea* for aiding and abetting is knowledge. ..... 27

A. Federal common law governs aiding and abetting liability ..... 27

B. The common law aiding and abetting standard is knowingly providing substantial assistance. ..... 29

C. The international law aiding and abetting standard is knowingly providing substantial assistance. ..... 31

D. Aiding and abetting requires substantial assistance, not but-for causation. ..... 35

CONCLUSION ..... 36

## TABLE OF AUTHORITIES

Federal Cases

*Abebe-Jira v. Negewo*,
72 F.3d 844 (11th Cir. 1996) .....21

*Aetna Cas. & Sur. Co. v. Leahey Const. Co.*,
219 F. 3d 519 (6th Cir. 2000) .....35

*Argentine Republic v. Amerada Hess Shipping Corp.*,
488 U.S. 428 (1989).....8

*Banco Nacional de Cuba v. Sabbatino*,
376 U.S. 398 (1964).....20

*Bowoto v. Chevron Corp.*, No. C 99-02506,
2006 U.S. Dist. LEXIS 63209
(N.D. Cal. Aug. 21, 2006)..... 12 n.2

*Burlington Indus., Inc., v. Ellerth*,
524 U.S. 742 (1998).....13, 20

*Cmty. Elec. Serv. of Los Angeles, Inc. v. Nat'l Elec. Contractors Ass'n, Inc.*,
869 F.2d 1235 (9th Cir. 1989). .....14

*Doe v. Drummond Co., Inc.*,
782 F.3d 576 (11th Cir. 2015) .....28, 29

*Doe v. Exxon Mobil Corp.*,
654 F.3d 11 (D.C. Cir. 2011) *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013).....*passim*

*Doe v. Exxon Mobil Corp.*,
2015 U.S. Dist. LEXIS 91107
(D.D.C. July 6, 2015) .....6, 35

*Filártiga v. Peña-Irala*,
630 F.2d 876 (2d Cir. 1980) .....3

*Filártiga v. Peña-Irala*,
577 F. Supp. 860 (S.D.N.Y. 1984) .....24

*First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*,
462 U.S. 611 (1983).....23

*Flomo v. Firestone Nat. Rubber Co., LLC*,
643 F.3d 1013 (7th Cir. 2011) .....*passim*

*Flores v. S. Peru Copper Corp.*,
414 F.3d 233 (2d Cir. 2003).....22

*Halberstam v. Welch*,
705 F.2d 472 (D.C. Cir. 1983) .....29, 31, 35

*Hamdan v. Rumsfeld*,
548 U.S. 2749 (2006) .....28

*Henfield's Case*,
11 F. Cas. 1099 (C.C.D. Pa. 1793).....28

*Holder v. Humanitarian Law Project*,
561 U.S. 1 (2010) .....30, 31

*In re Estate of Marcos Human Rights Litig.*,
25 F.3d 1467 (9th Cir. 1994) ..... 9, 16 n.3

*In re Arab Bank, PLC Alien Tort Statute Litig.*,
808 F.3d 144 (2d Cir. 2015) ..... 7

*In re Arab Bank, PLC Alien Tort Statute Litig.*,
822 F.3d 34 (2d Cir. 2016) ..... 7

*Jansen v. The Vrow Christina Magdalena*,
13 F. Cas. 356 (D.S.C. 1794) ..... 28 n.9

*John Doe I v. Nestle USA, et al.*,
766 F.3d 1013 (9th Cir. 2014) ..... 34

*Kadić v. Karadžić*,
70 F.3d 232 (2d Cir. 1995) ..... 16, 18

*Khulumani v. Barclay Nat'l Bank Ltd.*,
504 F.3d 254 (2d Cir. 2007) ..... *passim*

*Kiobel v. Royal Dutch Petroleum Co.*,
133 S. Ct. 1659 (2013) ..... *passim*

*Kiobel v. Royal Dutch Petroleum Co.*,
621 F.3d 111 (2d Cir. 2010) ..... *passim*

*Kiobel v. Royal Dutch Petroleum Co.*,
642 F.3d 379 (2d Cir. 2011) ..... 19

*Linde v. Arab Bank, PLC*,
384 F. Supp. 2d 571 (E.D.N.Y. 2005) ..... 35

*Marsh v. Rosenbloom*,
499 F.3d 165 (2d Cir. 2007) ..... 14

*Meyer v. Holley*,
537 U.S. 280 (2003).....13, 21

*Monterey v. Del Monte Dunes at Del Monterey, Ltd.*,
119 S. Ct. 1624 (1999) .....13

*Plains Commerce Bank v. Long Family Land & Cattle Co.*,
554 U.S. 316 (208) .....7

*Presbyterian Church of Sudan v. Talisman Energy Inc.*,
582 F.3d 244 (2d Cir. 2009).....32, 34

*Purviance v. Angus*,
1 U.S. (1 Dall.) 180 (Pa. 1786).....29

*Richardson v. Saltar*,
4 N.C. 505 (1817) .....29

*Rochez Bros., Inc. v. Rhoades*,
527 F.2d 880 (3d Cir. 1975).....29

*Romero v. Drummond Co., Inc.*,
552 F.3d 1303 (11th Cir. 2008) .....8

*Samantar v. Yousuf*,
560 U.S. 305 (2010).....13

*Schenley Distillers Corp. v. United States*,
326 U.S. 432 (1946)..... 26-27

*Sosa v. Alvarez-Machain*,
542 U.S. 692 (2004).....*passim*

*State v. McDonald*,
14 N.C. 468 (1832) .....30

*Steel Co. v. Citizens for Better Environment*,
523 U.S. 83 (1998) .....7

*Stutts v. De Dietrich Group*,
No. 03-CV-4058, 2006 U.S. Dist. LEXIS 47632
(E.D.N.Y. June 30, 2006).....29

*Talbot v. Janson*,
3 U.S. (3 Dall.) 133 (1759) .....28

*Tel-Oren v. Libyan Arab Republic*,
726 F.2d 774 (D.C. Cir. 1984).....*passim*

*Tex. Clinical Labs Inc. v. Leavitt*,
535 F.3d 397 (5th Cir. 2008) .....14

*Textile Workers Union v. Lincoln Mills*,
353 U.S. 448 (1957).....21

*Trustees of Dartmouth Coll. v. Woodward*,
17 U.S. (4 Wheat.) 518 (1819) ..... 21 n.6

*United States v. Bestfoods*,
524 U.S. 51 (1998) ..... 21, 21 n.6

*United States v. Kimbell Foods*,
440 U.S. 715 (1979) .....13, 20

Federal statutes and rules

An Act for the Punishment of Certain Crimes Against the United States, §§ 9-10, 1 Stat. 112 (1790) .....30

28 U.S.C. § 1350 .....*passim*

18 U.S.C. §2331 .....30

18 U.S.C. §2339 .....30, 31

Federal Rule of Civil Procedure 17.....14

International cases

*Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5) .....22, 23

*Ahmadou Sadio Diallo (Rep. of Guinea. v. Dem. Rep. Congo)*, 2007 I.C.J. 582, 605 (May 24, 2007).....23

*Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) .....33, 34

*Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Appeal Judgment (Sep. 26, 2013).....34

*Prosecutor v. Furundžija*,
Case No. IT-95-17/1-T, Judgment
(Dec. 10, 1998) ..... 33 n.10

*Prosecutor v. Karadzic*,
Case No. SCSL-03-01-A, Appeal Judgment
(Sep. 26, 2013) .....35

*Prosecutor v. Kunarac et al.*,
Case Nos. IT-96-23-T & IT-96-23/1-T,
Judgment (Feb. 22, 2001) .....35

*Prosecutor v. Ntakirutimana*,
Case No. ICTR-96-10-A & ICTR-96-4-17-A,
Appeal Judgement (Dec. 13, 2004) .....33

*Prosecutor v. Popovic*,
Case No. IT-05-88-A, Appeal Judgment
(Jan. 30, 2015) ..... 33 n.10

*Prosecutor v. Šainović*,
Case No. IT-05-87-A, Appeal Judgment
(ICTY Jan. 23, 2014) .....33 n.10

*Prosecutor v. Tadić*,
Case No. IT-91-1-T, Opinion & Judgment
(May 7, 1997) ..... 12 n.2, 33

*United States v. Flick*,
6 Trials of War Criminals Before the Nuremberg
Military Tribunals Under Control Council Law
No. 10 (1949) .....32

*United States v. Ohlendorf*
*(The Einsatzgruppen Case),*
4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1949) .....32

*United States v. Von Weizsaecker*
*(The Ministries Case),*
14 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1949) .....32, 33

*The Zyklon B Case, Trial of Bruno Tesch and Two Others,*
1 Law Reports of Trials of War Criminals 93 (1947) (British Military Ct., Hamburg, Mar. 1–8, 1946).....24, 32, 36

Other Authorities

Brief of International Human Rights Organizations as Amici Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (S. Ct. Dec. 2011) ..... 22 n.7

Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, *reprinted in* 28 HASTINGS INT'L & COMP. L. REV. 99 (Feb. 27, 2004).....25

Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (S. Ct. Dec. 2011) .....*passim*

James Kent, *Commentaries on American Law* (1836) .....10

John G. Fleming, *The Law of Torts* (Sydney: 8th ed. 1992).....30

Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985).....15

Restatement (Third) of Torts § 15 (Am. Law Inst. 2000).....35

Restatement (Second) of Torts § 867(b) (Am. Law Inst. 1977).....29

The Rome Statute of the International Criminal Court 37 I.L.M. 999 (1998).....33

William Blackstone, *An Analysis of the Laws of England* (6th ed. 1771).....10

William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996) .....15

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

*Amicus curiae* EarthRights International submits this brief in support of the Petitioners.[1]

*Amicus* is a human rights organization concerned with the enforcement of international law, including remedies against corporations. International law is primarily enforced through domestic mechanisms and there is a global consensus that corporations are subject to human rights law. Limiting accountability for human rights violations by excluding abuses committed or abetted by corporations would severely undermine global efforts to protect human rights, and prevent terrorism, contrary to the efforts of *amicus*.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Corporate legal personhood is a bedrock tenet of our law. Indeed, although corporations are a legal fiction, our law grants them rights, including constitutional rights. And a central feature of corporate personhood is that corporations can sue on their own behalf and be sued, including for torts. This rule ought to apply when corporations commit or abet the very worst kinds of torts, violations of universally recognized human rights, like genocide.

Every Circuit to have considered the question agrees that corporations may be sued under the Alien

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Both parties have filed blanket consents to the filing of any *amicus*.

Tort Statute – except one. In *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*"), 621 F.3d 111 (2d Cir. 2010), a sharply divided Second Circuit panel held that the ATS provides no jurisdiction over suits against corporations. Under *Kiobel I*, victims of human rights abuses cannot sue corporations – no matter how horrific the abuse or extensive the corporation's participation. That decision is wrong as a matter of law, and would enshrine an illogical and harmful double standard. It should be reversed.

*Kiobel I* was directly undermined by this Court's subsequent decision in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel II*"), 133 S. Ct. 1659 (2013). In holding that "mere corporate presence" was insufficient to displace the presumption against extraterritoriality, *Kiobel II*, assumed that corporations could be sued under the ATS. *Id.* at 1669. And while *Kiobel I* held that courts lack *jurisdiction* over ATS claims against corporations, *Kiobel II*'s holding that the policies underlying the presumption against extraterritoriality barred those same ATS claims was a decision on the *merits*. *See Id.* at 1664. The Court could not reach the merits unless it *had* jurisdiction. So it must have concluded that *Kiobel I* was wrongly decided.

And, as the United States argued in *Kiobel II*, it was wrongly decided. Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Dec. 2011) [hereinafter "U.S. *Kiobel* Br."]. Corporate immunity is anathema even for garden-variety torts. But *Kiobel I* exempted from liability acts that are so universally reviled that they render the perpetrator "an enemy of

all mankind." *See Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). *Kiobel I* therefore contravenes the centuries-old understanding, common to our legal system and every other, that juridical persons can be sued just like natural persons.

"Sometimes, it's in the interest of a corporation's shareholders for management to violate . . . norms of customary international law." *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1018 (7th Cir. 2011) (Posner, J.). Yet *Kiobel I* rewards those few corporations that choose to profit from atrocity and penalizes corporations that respect fundamental rights, forcing them to compete on an uneven playing field. Worst of all, it denies redress to those harmed. In short, *Kiobel I* would immunize corporations in the last situation in which they should be given a free pass. Nothing in federal or international law requires this anomaly.

*Kiobel I* held that international law determines whether corporations can be sued and, limiting its analysis to international *criminal* law, held that international law does not provide for corporate liability. 621 F.3d at 118-20. Both propositions are mistaken. Federal common-law rules apply. This Court has held that the ATS is "only jurisdictional." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). Its text provides that jurisdiction requires only a "violation" of international law. 28 U.S.C. § 1350. Thus, the injury to the plaintiff must be barred by the law of nations. But there need not be an international law cause of action for that violation. Once jurisdiction is established, an ATS cause of action is provided by *federal common law*. *Sosa*, 542 U.S. at 724. Thus,

questions regarding the scope of liability must be determined according to federal common law.

But even if courts looked to international law to determine corporate liability, international law itself leaves the question of how international norms will be enforced to domestic law. This principle has been recognized since the drafting of the ATS. Faithful adherence to it is especially warranted in the context of private civil liability, for which international law typically does not provide a forum, and for corporations, which are created by municipal law.

Therefore, in assessing whether corporations can be held liable, courts look to well-established federal or traditional common law rules. Liability rules drawn from common law principles may be informed by rules found in international law, but *Sosa*'s threshold test for identifying jurisdiction-conferring norms of international law does not apply to the rules for allocating liability. And the applicable rule must give effect to Congress' purposes in enacting the ATS.

Corporate liability has been a feature of the common law since the Founding. International law turns to domestic law to recognize corporate legal personality, and in the form of general principles recognized by all of the world's legal systems, also recognizes such liability.

Corporate liability is inherent in the whole notion of incorporation, which allows suits against the corporation in exchange for the limitation of shareholder liability. Corporate immunity would frustrate the congressional purpose of providing an

adequate federal forum for enforcing fundamental human rights norms, by uniquely shielding the corporate "person," even where all other persons and individual actors would be responsible. The ATS provides no such exception.

Common-law principles also apply should this Court consider the question of the standard for aiding and abetting liability. Under these principles, the proper *mens rea* is knowledge.

In opposing *certiorari*, Arab Bank reached beyond the question presented in Plaintiffs' petition and argued it cannot be held liable even if it *knowingly* aided and abetted terrorism. According to Arab Bank, Plaintiffs must, but did not, allege that Arab Bank had the *purpose* to help murder innocents. Br. Resp. Opp. *Cert.* at 34. This Court should not decide that question. Indeed, the proper *mens rea* standard should not matter here, since the district court essentially found Plaintiffs sufficiently alleged purpose. Reply Br. Pet'rs Supp. *Cert.* at 9.

Regardless, this question, like corporate liability, is determined under federal common law. Whether a defendant is liable for abetting a violation of a universally recognized human right is not part of the threshold jurisdictional question of whether the plaintiff has suffered a violation of that right. Instead, it is a liability question and accordingly is one of federal common law.

Under ordinary, longstanding common law principles, a defendant who knowingly provides substantial assistance to the primary tortfeasor is

liable. And even if international law controlled, it has, since Nuremberg, applied the same knowledge standard as the common law. A party that willingly assists terrorism or genocide cannot absolve itself by claiming it lacked the principal's purpose. "I knew I was abetting mass murder, but did not care if the murders were committed" is not a defense.

## ARGUMENT

### I. This Court has accepted that corporations can be sued.

This Court's decisions in *Sosa* and *Kiobel II* correctly assume that corporations can be sued under the ATS. *Sosa* noted that one consideration in assessing whether the ATS provides jurisdiction is "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20. In distinguishing between norms that require state action and those that do not, this Court equated all private actors, treating corporations and natural persons the same way. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 50-51 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013), *relevant holding adopted in*, 2015 U.S. Dist. LEXIS 91107, *8 (D.D.C. July 6, 2015); *Kiobel I*, 621 F.3d at 165 (Leval, J., concurring in the judgment); U.S. *Kiobel* Br. at 18; Petitioners' Br. at 29-30.

*Sosa* explained that the ATS does two things: (1) it provides subject matter *jurisdiction* to the federal courts; and (2) it allows federal courts to recognize certain *causes of action* as a matter of *federal common*

*law*. *Sosa*, 542 U.S. at 724. Under this framework, *Kiobel II* necessarily assumed corporate liability. There, this Court dismissed the ATS claims due to the policies underlying the presumption against extraterritoriality, the application of which was a "merits question." *Kiobel II*, 133 S. Ct at 1664. Thus *Kiobel II* implicitly found that jurisdiction was proper, because it could not otherwise have reached the merits. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102 (1998); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324, (2008). But *Kiobel I* held that the ATS does not provide *jurisdiction* over suits against corporations. 621 F.3d at 148-49. That conclusion was necessarily rejected by this Court's analysis in *Kiobel II*, which found no jurisdictional bar to considering a case involving a corporate defendant.

This Court's holding in *Kiobel II* that "mere corporate presence" was insufficient to displace the presumption against extraterritoriality also presumes that, under other circumstances, corporations are amenable to suit. *See* 133 S. Ct. at 1669. The Second Circuit suggested as much in this case. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 155 (2d Cir. 2015); *accord In re Arab Bank, PLC Alien Tort Statute Litig.*, 822 F.3d 34, 44 (2d Cir. 2016) (Pooler, J., dissenting from denial of *en banc* review).

## II. Federal common law governs the issue of whether corporations can be sued under the ATS.

The *Kiobel I* panel erroneously concluded that, in order for corporations to be held liable under the

ATS, customary international law must specifically provide for corporate liability. 621 F.3d at 118. That conclusion conflicts with the statute's text, *Sosa*'s holding that an ATS claim is a common law cause of action, the historic practice of federal courts applying federal common law to effectuate federal claims, the ATS's original purpose of ensuring that claims involving international law could be heard in federal court, and the structure of international law, which leaves the means of enforcement of international norms to domestic law.

All of this points to a single conclusion: while customary international law defines the content of the right whose violation gives rise to ATS jurisdiction, federal common law determines whether corporations may be held liable.

### A. The text of the ATS, *Sosa*, the ordinary role of federal common law and the purpose of the ATS all direct the court to federal common law.

#### 1. The text of the ATS requires that federal common law governs.

The ATS grants jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350. The statute "by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). Text alone shows that the ATS does not bar corporate liability. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); Petitioners' Br. at 20.

The statute's plain language also refutes the contention that international law governs. The text of the ATS does not require that the cause of action "arise under" the law of nations; "by its express terms," ATS jurisdiction requires "nothing more than a *violation* of the law of nations." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring); *accord In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994). *Kiobel I* misread the text, concluding that its silence as to who can be sued suggests that a specific cause of action against a corporation must exist under customary international law. 621 F.3d at 121-22. But the text does not require that international law define who can be a proper defendant, only that the infringed-upon *right* be recognized under international law.

The use of the word "tort," a domestic law concept, also requires that domestic tort principles control. Petitioners' Br. at 18.

Once there is jurisdiction over a tort suit for the violation of a particular international norm, domestic tort law, including corporate liability, applies. The *Kiobel I* panel's reading of the ATS cannot be reconciled with the plain text.

### 2. *Sosa* directs courts to apply federal common law.

Other than the right violated, federal common law generally applies to issues under the ATS. The ATS's "jurisdictional grant is best read as having been enacted on the understanding that the common law

would provide [the] cause of action." *Sosa*, 542 U.S. at 724. While there must be a "violation[] of [an] international law norm," ATS claims are "claims under federal common law." *Id.* at 732; *accord id.* at 721. This conclusion flows expressly from the eighteenth-century understanding of international law. *See id.* at 714-24. *Sosa* recognized certain violations of international norms by private parties were "admitting of a judicial remedy" – *i.e.*, subject to domestic enforcement. *Id.* at 715. *Kiobel II*, relying on *Sosa*, reaffirmed this approach, stating that the question in ATS cases is "whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law." 133 S. Ct. at 1666.

Blackstone, upon whom *Sosa* relied, confirms that when violations of international law are "committed by private subjects," they "are then the objects of the municipal law." William Blackstone, *An Analysis of the Laws of England* 125 (6th ed. 1771). Kent's *Commentaries*, also cited by *Sosa*, note that "[t]he law of nations is likewise enforced by the sanctions of municipal law." 1 James Kent, *Commentaries on American Law* *181-82 (1826). This is why *Sosa* speaks of recognizing claims "under federal common law for violations of [an] international law norm." 542 U.S. at 732.

The ambit of federal common law under the ATS necessarily includes substantive liability rules. *Id.* at 729 (noting that the ATS is one of the "post-*Erie* . . . limited enclaves in which federal courts may derive some *substantive* law in a *common law way*" (emphasis added)). Indeed, the cause of action must be

determined as a matter of common law, because international law, both today and when the ATS was passed, generally does not address the scope of *civil* liability for violations but instead leaves such matters to domestic law. *See infra* Section II.B.

Accordingly, once the jurisdictional threshold has been met – a violation of a *right* protected by the law of nations – there is a federal common law cause of action and federal common law provides the rules governing liability.

The *Kiobel I* panel incorrectly relied on *Sosa*'s footnote 20 to conclude that customary international law governs the scope of ATS liability. 621 F.3d at 127–28. Footnote 20 did not address liability. As the Petitioners explain, it recognized that certain international *norms*, like torture, require state action, while others, like genocide, do not, and that whether, for a given norm, the perpetrator must be a state actor is a question of international law. 542 U.S. at 732 n.20; Petitioners' Br. at 27-31. Where international law requires state action, it is an element of the substantive offense. Accordingly, looking to international law to determine whether the jurisdiction-triggering norm requires state action fully accords with the distinction between the *right* violated (defined by international law) and the scope of the remedial *cause of action* (provided by domestic law).

Whether a corporation can be held liable is not an element of the international right whose violation triggers jurisdiction. It is a question that arises only after the plaintiff establishes jurisdiction. And under *Sosa*, the cause of action is found in federal common

law. Thus, *Sosa* contemplated an ordinary common law tort claim to remedy violations of universally recognized human rights norms. Accordingly, corporate liability is defined by the federal common law as part of the cause of action. *Exxon Mobil*, 654 F.3d at 50-51.

As noted above, footnote 20 *supports* corporate liability because the Court drew no distinction between liability for natural persons and corporations. *Supra* Section I. And this is reflected in international law as well: there is no act that would violate international law if committed by an individual, but would not if committed by a corporation. U.S. *Kiobel* Br. at 20; Petitioners' Br. at 30-31.[2] An abuse that is of universal concern is not any less so because a corporation is responsible.

The *Kiobel I* majority erred in holding that ATS cases cannot be brought against corporations unless international law itself expressly provides for corporate liability.

---

[2] *Accord Bowoto v. Chevron Corp.*, No. C 99-02506, 2006 U.S. Dist. LEXIS 63209, *37 (N.D. Cal. Aug. 21, 2006) (noting that international law provides little reason to differentiate between corporations and natural persons); *see also Prosecutor v. Tadić*, Case No. IT-91-1-T, Opinion & Judgment ¶ 655 (May 7, 1997) (crimes against humanity can be committed by "*any* organization or group, which may or may not be affiliated with a Government" (internal punctuation omitted)).

### 3. Courts generally look to federal liability rules to effectuate federal causes of action.

Federal courts regularly apply general liability rules to give effect to federal causes of action. *See United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–55 (1998) (fashioning a "uniform and predictable standard" of vicarious liability in Title VII actions "as a matter of federal law").

When Congress creates a tort action, it "legislates against a legal background" of ordinary tort liability rules. *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *accord Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999); Petitioners' Br. at 18. Should Congress wish to abrogate a common-law rule, the statute must "speak directly" to the question addressed by the common law. *Meyer*, 537 U.S. at 285. And where a statute "clearly covers a field formerly governed by the common law," courts should interpret the statute "consistently with the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010). If a statute that *displaces* the common law should be interpreted consistently with common law rules, then surely a statute like the ATS – which does *not* displace the common law, but instead creates jurisdiction to hear *common law claims* – must be too.

Courts also apply federal common law "to fill the interstices of federal legislation." *Kimbell Foods*, 440 U.S. at 727; *accord Sosa*, 542 U.S. at 726 (discussing this rule); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 287 (2d Cir. 2007) (Hall, J.,

concurring) (applying this rule to the ATS). The text of the ATS neither precludes corporate liability nor requires that the question be resolved under international law. *See supra* Section II.A.1. Thus, even if the text and *Sosa* were agnostic on the proper body of law to apply, which they are not, such silence would be a further reason to look to federal common law.

Additionally, *Kiobel I* conflicts with Federal Rule of Civil Procedure 17(b)(2); a corporation's capacity to be sued is determined "under [the law by] which it was organized." *E.g. Cmty. Elec. Serv. of Los Angeles, Inc. v. Nat'l Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235, 1239 (9th Cir. 1989); *Tex. Clinical Labs Inc v. Leavitt*, 535 F.3d 397, 403 (5th Cir. 2008); *see also Marsh v. Rosenbloom*, 499 F.3d 165, 176–77, 184 (2d Cir. 2007) (citing Rule 17(b) and holding that CERCLA does not preempt state law regarding corporate capacity). While Rule 17 points to the law of the place of incorporation rather than general federal common law, it confirms that international law does not control.

#### 4. Congress' original purpose of providing a federal forum suggests that who can be sued must be determined by common law rules.

In passing the ATS, Congress sought to provide a federal forum for the limited subset of torts that implicate international law. The First Congress was concerned about "the inadequate vindication of the law of nations." *Sosa*, 542 U.S. at 715-19. State courts already had jurisdiction over such suits. *Id.* at 722;

*Tel-Oren*, 726 F.2d at 790 (Edwards, J., concurring). But Congress was afraid that state courts could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations; it therefore wanted to provide an alternative, *federal* forum. *Tel-Oren*, 726 F.2d at 783-84, 790-91 (Edwards, J., concurring); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 235-36 (1996); Petitioners' Br. at 22. Thus, the First Congress wanted to make federal courts *more accessible* to foreigners bringing these sorts of tort claims. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 21 (1985).

Given these aims, the First Congress would have expected federal courts to resolve the question of who could be sued by reference to the familiar body of general common law – just as state courts would do. Any other approach could potentially exclude from federal court certain suits involving violations of the laws of nations even though those same suits would be heard in state court. That is precisely what the statute meant to avoid. *Tel-Oren*, 726 F.2d at 790-91 (Edwards, J., concurring).

### B. International law itself compels the conclusion that federal common law applies.

Even if the *Kiobel I* majority were correct that courts must *first* look to international law, the applicable rule would still ultimately come from federal common law, because international law directs courts to domestic law. The Framers' understanding that international law is enforced through domestic law remains true today.

As courts in ATS cases have long recognized, and the United States noted, international human rights law leaves the manner in which it is enforced to States' discretion. *E.g.*, *Kadić*, 70 F.3d at 246 (holding international law "generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available"); U.S. *Kiobel* Br. at 19.[3]

---

[3] *Accord Exxon Mobil*, 654 F.3d at 51 (The "'position of international law on whether civil liability should be imposed for violation of its norms is that international law takes no position and leaves that question to each nation to resolve.'") (quoting *Kiobel I*, 621 F.3d at 152 (Leval, J., concurring in the judgment)); *Flomo*, 643 F.3d at 1020; *Marcos*, 25 F.3d at 1475; *Kiobel I*, 621 F.3d at 172–76, 187–89 (Leval, J., concurring in the judgment) (international law establishes "norms of prohibited conduct," but "says little or nothing about how those norms should be enforced," leaving these questions to domestic law); *Khulumani*, 504 F.3d at 286 (Hall, J., concurring); *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring) (the law of nations does not "define the civil actions to be made available by each . . . nation[]," and although international law governs whether there has been a violation, the decision of "how the United States wishe[s] to react to such violations [is a] domestic question"); Petitioners' Br. at 32.

Consistent with that international principle, this Court in *Sosa* adopted the position, discussed in detail by Judge Edwards in his concurrence in *Tel-Oren*, 726 F.2d at 777-82, that under the ATS, international law itself need not provide a private cause of action; the Court rejected Judge Bork's contrary view, which would have nullified the ATS. *Sosa*, 542 U.S. at 714, 724, 729-31. Thus, *Sosa*, like international law, distinguishes the question of whether a person has suffered a violation of an international right from the scope of the remedial cause of action a state chooses to provide.[4]

The *Kiobel I* majority conceded that international law "leave[s] remedial questions to States." 621 F.3d at 147. But it defined "remedial" as narrowly limited to forms of *relief* available – damages, declaratory relief, an injunction – without regard to how the term is used in international law. *Id.* at 147 & n.50. As *Sosa* recognized, however, "remedy" in this context signifies the means to enforce a right, equivalent to a cause of action. In discussing whether to allow a cause of action for the brief detention at issue in that case, the Supreme Court referred to "the creation of a federal remedy." 542 U.S. at 738. That plainly speaks to whether a cause of action was available, not what form of relief the plaintiff might recover.

---

[4] *See Flomo*, 643 F.3d at 1019 (distinguishing a customary international law principle from "the means of enforcing it, which is a matter of procedure or remedy"); *Exxon Mobil*, 654 F.3d at 41-42 (holding that because international law "creates no civil remedies and no private right of action [] federal courts must determine the nature of any [ATS] remedy . . .by reference to federal common law").

Thus, international law provides the right and domestic law provides the cause of action – the remedy to enforce that right. Judge Leval's concurrence in *Kiobel I* recognized that the "remedy" at issue in this context is the means of enforcement and redress generally, and is thus much broader than merely what kind of relief a plaintiff may recover. *Kiobel I*, 621 F.3d at 175 n.33 (Leval, J., concurring in the judgment). Indeed, in conflating "remedy" with "relief," *Kiobel I* departed from established Second Circuit law. In *Kadić*, the Second Circuit equated "creat[ing] private causes of action" under the ATS with "defining the remedies." 70 F.3d at 246.

The *Kiobel I* panel's position would render meaningless the principle that international law allows States to define domestic remedies, and would render the ATS a dead letter. The specific type of relief available only matters if there *is* a civil cause of action. But international law does not provide one. Under the panel's approach, there would be *no* claims for which the courts could apply relief – against a corporation or a natural person, *see Flomo*, 643 F.3d at 1019; *Kiobel I*, 621 F.3d at 153, 176, 178 (Leval, J., concurring in the judgment) – and thus no issue left to domestic law.

The *Kiobel I* majority's specific holding that the ATS requires that international law provide a right to sue corporations is simply a version of the position, rejected by *Sosa*, that international law must provide the right to sue. *Kiobel I*, 621 F.3d at 176 (Leval, J., concurring in the judgment).[5] Since international law

---

[5] The *Kiobel* majority appeared to acknowledge that it embraced this view. 621 F.3d at 122, n.24.

does not provide a right to sue *anyone* for customary international law violations, it cannot be expected to explicitly provide a right to sue a corporation. *Id.*

Whether a corporation may be held liable in tort for violations of international law is a question international law leaves to states to determine for themselves. For this reason, courts and judges have explicitly rejected the *Kiobel I* approach and instead applied federal common law to this issue, finding that the ATS recognizes corporate liability. *Flomo*, 643 F.3d at 1019–20; *Exxon Mobil*, 654 F.3d at 41–43, 50; *Kiobel I*, 621 F.3d at 174–76 (Leval, J., concurring in the judgment); *see also Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379, 380 (2d Cir. 2011) (Lynch, J., dissenting from denial of rehearing *en banc*) (four judges opining that, "for the reasons stated by Judge Leval," the *Kiobel* decision is "very likely incorrect"). The *Kiobel I* majority's opinion cannot be reconciled with the manner in which international law contemplates its own enforcement.

## III. Federal common law provides for corporate liability.

Concluding that federal common law rules govern the issue of corporate liability does not end the inquiry. The Court must consider what sources to consult as part of a federal common law analysis and discern the applicable rule. The primary source is well-established federal or traditional common law rules. The rule established must best implement Congress' purposes in enacting the statute. Thus, the question is, when a norm that meets *Sosa*'s threshold test is

violated, does corporate liability or corporate immunity better effectuate Congress' aims?

Discerning the rule here is easy. Under ordinary common law principles, and under international law, corporations are liable on an equal footing with natural persons. This rule also vindicates the policies animating the ATS. Accordingly, the Court should simply adopt the usual rule of corporate liability rather than creating a special rule that corporations should be immune from suit when they participate in violations of universally recognized human rights.

### A. The ATS should employ a uniform federal rule based on traditional common law principles.

In discerning a federal common law rule, courts must decide whether to adopt state law or apply a uniform federal rule, *e.g. Kimbell Foods*, 440 U.S. at 727; the latter is appropriate in cases involving international law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-26 (1964). This is especially true here, since one purpose of the ATS was to ensure that a uniform body of law would apply to these kinds of claims. *See supra* Section II.A.4.

The ATS creates a federal cause of action under which federal common law tort principles are used to redress violations of customary international law, so ordinary common law principles should apply here. This is consistent with the manner in which federal courts typically establish uniform federal standards, *e.g.*, *Burlington Indus.*, 524 U.S. at 754, as well as the rule that Congress must "speak directly" to a question

in order to abrogate a common law principle. *Meyer*, 537 U.S. at 285. Indeed, this Court has held that "the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of" this rule. *United States v. Bestfoods*, 524 U.S. 51, 63 (1998).

The federal common law rule must implement the policies underlying the statute. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (applying *Textile Workers* to the ATS). Thus, the applicable rule in this case must give effect to Congress' decision to recognize tort liability for violations of international law.

### B. Under federal common law, corporations are subject to the same liability rules as natural persons.

The common law subjects corporations to the same civil liability as natural persons; this is inherent in the whole notion of corporate personality, and has been the rule for centuries. Petitioners' Br. at 34-36; U.S. *Kiobel* Br. at 25 (noting that "the proposition that corporations are deemed persons for civil purposes, and can be held civilly liable, has long been recognized as unquestionable") (internal quotations omitted).[6]

---

[6] *See Exxon Mobil*, 654 F.3d at 47-48 (collecting cases); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 667 (1819) (noting that a "corporation at common law . . . possesses the capacity . . . of suing and being sued") (op. of Story, J.); *Bestfoods*, 524 U.S. at 62-65 (applying ordinary common law principles to CERCLA and finding corporations can be held liable).

*Amicus* is aware of no state that departs from this rule.

While it is not necessary to consult international law, where it accords with established federal law, there can be little argument against its application in ATS cases, in part because international law is part of federal law. *Sosa*, 542 U.S. at 729. International law principles support corporate liability. *Exxon Mobil*, 654 F.3d at 51-54; Petitioners' Br. at 42-51. For example, general principles of law – a species of international law derived from principles common to States' domestic law – provide rules applicable in ATS cases. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 251 (2d Cir. 2003). All legal systems recognize that corporations can be sued; this is a general principle of law. *Exxon Mobil*, 654 F.3d at 53-54; Petitioners' Br. at 43-44.[7]

The International Court of Justice has twice recognized corporate personality under international law, either in the form of general principles or by looking to the specific law of the incorporating jurisdiction. In *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), the ICJ noted that international law recognized corporations as institutions "created by States" within their domestic jurisdiction, and that the court therefore needed to look to general principles of law to

---

[7] *See* Brief of *Amici Curiae* International Human Rights Organizations in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. June 13, 2012), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_international.authcheckdam.pdf.

answer questions about corporate separateness. *Id.* at 33-34, 37, 39.

More recently, the ICJ held that a corporation has "independent and distinct legal personality" under international law if it has that status under the domestic law of the relevant nation. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objection Judgment, 2007 I.C.J. 582, 605 (May 24, 2007). Just as international law generally looks to domestic law for its means of local enforcement, international law looks to domestic law for rules of corporate personality.

This Court, citing *Barcelona Traction*, approved liability against a corporation for a claim "aris[ing] under international law." *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623 (1983). There, the Court upheld a counterclaim against a Cuban government corporation for the illegal expropriation of property, under principles "common to both international law and federal common law." *Id.* The "understanding of corporate personhood [reflected in *FNCB* and *Barcelona Traction*] is directly contrary to the conclusion of the majority in *Kiobel [I]*." *Exxon Mobil*, 654 F.3d at 54.

Since the rule that corporations can be held liable in tort is clear in both domestic and international law, it should be applied under the ATS.

### C. Corporate liability best effectuates the Framers' purposes in passing the ATS.

As *Sosa* recognized, the ATS was enacted to vindicate the laws of nations. 542 U.S. at 717. The ATS expresses a Congressional policy of using tort law to redress international wrongs. The same corporate liability rule that ordinarily applies in tort cases furthers Congress' goals in passing the statute.

First, liability rules under the ATS must reflect the universal condemnation of the underlying violations. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (S.D.N.Y. 1984). A holding that the corporate liability that applies to run-of-the-mill torts does not apply to genocide, terrorism or crimes against humanity would turn this principle on its head. International law would be subverted if, for example, a modern day Tesch & Stabenow – whose top officials were convicted at Nuremberg for supplying poison gas to the death chambers of Auschwitz, *The Zyklon B Case, Trial of Bruno Tesch and Two Others*, 1 Law Reports of Trials of War Criminals 93 (1947) (British Military Ct., Hamburg, Mar. 1–8, 1946) – could participate in and benefit from atrocities and not be held to account by the victims.

Second, tort law's twin aims – compensation and deterrence – cannot be achieved without holding corporations liable. Petitioners' Br. at 25. Where a corporation is involved in abuse, the corporation, not its agents, reaps the profits. Thus, there is no reason to believe that the agents have the wherewithal to provide redress. *Flomo*, 643 F.3d at 1019; *Kiobel I*, 621

F.3d at 179 (Leval, J., concurring in the judgment); U.S. *Kiobel* Br. at 24. And since it is sometimes in a corporation's interests to violate international law, *Flomo*, 643 F.3d at 1018, a rule that only a corporation's agents are potentially liable would under-deter abuse.

Third, Congress passed the ATS in part because it preferred claims involving international law to be heard in federal rather than state court. *See supra* Section II.A.4. The First Congress would not have wanted a foreign claimant, who could sue a corporation if he filed his claim in state court, to be barred from federal court. Petitioners' Br. at 22-24, 37. In many ATS cases, the plaintiffs also plead state-based common law tort claims. Precluding corporate liability under the ATS would disadvantage aliens' claims arising under the law of nations *vis-a-vis* their state law claims – thus "treat[ing] torts in violation of the law of nations less favorably than other torts," contrary to the Framers' understanding. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain*, 2003 U.S. Briefs 339, *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 100 (2004).[8] The *Kiobel* majority's position would undermine the purposes of the ATS by leaving at least some such plaintiffs recourse only to state court.

Fourth, refusing to recognize corporate liability would lead to absurd results. The ability to sue the corporation is inherent in the notion of limited

---

[8] This brief's argument that ATS claims were part of the common law and required no implementing legislation was adopted in *Sosa*. 542 U.S. at 714.

shareholder liability; plaintiffs may sue the corporation *because* limited liability ordinarily immunizes the shareholders. If corporations were not legal persons that could be sued, they could not be considered legal persons separate from their shareholders. They would simply be an aggregation of agents (the corporation's directors, officers and employees) acting on the shareholders' behalf. Thus, if corporations cannot be sued, the *shareholders* would be liable on an agency theory for everything that employees of the company do, without need to pierce any veil.

To find that neither corporations nor their shareholders could be sued, the Court would have to find an affirmative rule of corporate *immunity* – that shareholders may create a corporation to hold their assets and carry on their business, interpose that corporation as a shield against their own liability, and yet not subject the corporation to liability. Neither federal common law nor international law creates any such immunity. Corporate personality for the purposes of limiting shareholders' liability and corporate personality for the purposes of being sued are two sides of the same coin, and both derive from principles of domestic law common to all legal systems.

Arab Bank wants the benefits of corporate personhood, while evading the responsibilities. But it cannot pick and choose only the aspects of corporate personality that it likes. *See Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946) (holding that "[o]ne who has . . . chosen [a corporation] as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to

avoid the obligations which [a] statute lays upon it for the protection of the public").

* * *

Under the ATS, the violation of a universally recognized right gives rise to a federal common-law tort cause of action. The corporate liability that applies to ordinary torts should not be relaxed for abuses that transgress humanity's most fundamental values.

## IV. The *mens rea* for aiding and abetting is knowledge.

This Court has no occasion to decide the *mens rea* for aiding and abetting in this case. Nonetheless, Arab Bank's claim that an aider and abettor must share the primary abuser's purpose to commit atrocity is wrong. Under ordinary common law principles (and under international law), aiding and abetting requires only *knowledge* that one is assisting the wrong. And that makes perfect sense. The law has a clear interest in deterring a person or entity willing to assist abuse, regardless of their motive.

### A. Federal common law governs aiding and abetting liability.

The same principle in *Sosa* that directs courts to federal common law for corporate liability, that the jurisdictional question – whether the plaintiff has suffered a "violation[] of [an] international law norm" – is a question of international law, but the scope of liability is a question of federal common law, 542 U.S. at 724, 732; *supra* Section I.A.2, applies equally here.

Aiding and abetting is not an independent crime but a theory of *liability* for a substantive offense. *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n. 40 (2006) (plurality opinion). Thus, aiding and abetting standards go not to whether a plaintiff's international law rights have been violated, but rather to the remedy available. They are a matter of federal common law. *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 608 (11th Cir. 2015).

Our courts have always recognized civil liability for aiding and abetting violations of international law. *See, e.g., Talbot v. Janson*, 3 U.S. 133, 156, 167-68 (1795)[9]; *Henfield's Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (Chief Justice Jay noting liability "under the law of nations, by committing, aiding or abetting hostilities").

Courts may apply international law that is consistent with established federal common law. But if international law did provide a different standard, courts should "opt for the standard articulated by the federal common law." *Khulumani*, 504 F.3d at 287 (Hall, J., concurring). International law is ill-suited to the rules of civil accomplice liability; international law does not specify the means of its domestic enforcement, so there is no general body of international law civil liability rules. There are international criminal law rules, but ATS actions are not international criminal prosecutions: they are domestic, common law civil actions. Ultimately, however, what law to apply matters little, because

---

[9] *Talbot* was, at least in part, an ATS case. *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.S.C. 1794) (No. 7,216).

international law and the common law provide for the same "knowledge" standard.

### B. The common law aiding and abetting standard is knowingly providing substantial assistance.

Common-law aiding and abetting liability requires only that the defendant substantially assist the primary tortfeasor, *knowing* he is assisting the tort. *Halberstam v. Welch*, 705 F.2d 472, 477-78 (D.C. Cir. 1983). The Restatement (Second) of Torts § 876(b) (1977), upon which *Halberstam* relied, *id.*, recognizes this as the ordinary common law rule. And it is the federal common law test as well. *See Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 886 (3d Cir. 1975); *Stutts v. De Dietrich Group*, No. 03-CV-4058, 2006 U.S. Dist. LEXIS 47638, at *47 (E.D.N.Y. June 30, 2006). Accordingly, the Eleventh Circuit, "incorporating the [common law] standards from *Halberstam*," affirmed that aiding and abetting under the ATS requires only "knowing substantial assistance." *Drummond*, 782 F.3d at 608; *accord Khulumani*, 504 F.3d at 287-89 (Hall, J., concurring).

This knowledge standard has long been recognized. Indeed, some early cases suggest that liability for aiding and abetting torts was appropriate even in the absence of actual knowledge. *See, e.g., Purviance v. Angus*, 1 U.S. 180, 185 (Pa. 1786) (shipmaster liable for aiding commission of tort when he had constructive knowledge that the action was trespass); *Richardson v. Saltar*, 4 N.C. 505, 507 (1817) (co-defendants liable for aiding trespass despite lack of evidence that they knew principal perpetrator was

acting without legal authority); *State v. McDonald*, 14 N.C. 468, 471 (1832) (defendants guilty of abetting wrongful arrest if they had constructive knowledge that warrant was invalid).

The knowledge standard is also found in English common law, the original source for many of our common law principles: "[T]here is cogent support both in principle and ancient authority for the suggestion that . . . [k]nowingly assisting . . . would suffice" for liability. John G. Fleming, The Law of Torts 257 (Sydney: 8th ed. 1992).

The Congress that enacted the ATS understood that this knowledge standard applied to international offenses. It passed a criminal statute outlawing piracy that included penalties for any person "who shall . . . *knowingly aid and assist*" piracy. An Act for the Punishment of Certain Crimes Against the United States, §§ 9-10, 1 Stat. 112, 114 (1790) (emphasis added). Congress believed that it was merely codifying the law of nations. *See Sosa*, 524 U.S. at 719. Thus, the First Congress understood that knowingly aiding an international offense was prohibited, and would have expected that the common law would apply this prohibition to torts in violation of the law of nations under the ATS.

More recently, Congress has allowed U.S. citizens to bring civil claims against those who – and made it a crime to – "knowingly" provide material support to certain terrorist organizations, including those at issue here. 18 U.S.C. §2331 *et seq.*; *see* 18 U.S.C. §2339B(a)(1) (establishing knowledge standard); *see also Holder v. Humanitarian Law*

*Project*, 561 U.S. 1, 12 (2010) (describing section 2339B(a)(1)). Indeed, other plaintiffs in these very suits, who happen to be U.S. nationals, have brought such claims. Petitioners' Br. at 9. Since Congress has already determined that the proper *mens rea* for these claims is knowledge, there is no reason to apply a different standard under the ATS.

Last, requiring purpose makes little sense, not least because it would obliterate aiding and abetting liability. Conspiracy requires purpose: an explicit or tacit "agreement" to participate in unlawful acts, a "common design." *Halberstam*, 705 F.2d at 477-78. Abetting has a lesser *mens rea*, knowledge, but a *heightened actus reus*, substantial assistance. *Id.* If in addition to its heightened *actus reus*, aiding and abetting also shared conspiracy's heightened *mens rea*, or something quite close, aiding and abetting would essentially collapse into conspiracy. The Court should not make a hash of these distinct liability theories. *Id.* (noting the importance of keeping clear the distinctions between abetting and conspiracy).

### C. The international law aiding and abetting standard is knowingly providing substantial assistance.

The customary international law *mens rea*, like the common law one, is knowledge. That provides additional support for the common law knowledge standard. And even if the Court were to look instead to international criminal law, and require that accessory liability rules meet *Sosa*'s threshold test, which it should not, the *mens rea* is still knowledge.

Since Nuremberg, international law has held liable those who substantially and knowingly assist the perpetration of an offense. For example, in *United States v. Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1217, 1222 (1949), the court held that "[o]ne who knowingly . . . contributes to the support [of an organization committing abuses] must, under settled legal principles, be deemed . . . an accessory," and convicted defendants even though they did not "approve" or "condone" atrocities. Likewise, in *United States v. Ohlendorf* (*The Einsatzgruppen Case*), 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 569, 572-73 (1949), the court convicted a defendant as an accessory for giving names of suspected political opponents to the Nazis, knowing they would be executed. And in *The Zyklon B Case, Trial of Bruno Tesch and Two Others*, Case No. 9, 1 Law Reports of Trials of War Criminals at 93, the court convicted industrialists supplying poison gas to Nazi extermination camps "well knowing" it would be used, not for delousing, but to kill.

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), the Second Circuit applied a *mens rea* of purpose, purportedly drawn from Nuremberg. But in the sole case it cited, the court convicted defendants who lacked purpose, based on their knowledge. *United States v. Von Weizsaecker (The Ministries Case)*, 14 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1949). For example, the court convicted defendant Puhl of abetting crimes against humanity because he

"knew" that property he disposed of was stolen from concentration camp inmates, even though the theft was "probably repugnant to him." *Id.* at 620-21. And although defendants von Weizsaecker and Woermann did "no[t] in their hearts approve of" the mass deportation of Jews to slave labor and death, "[t]he question [wa]s whether they knew of the program and whether in any substantial manner" abetted it. *Id.* at 478. The Second Circuit found the supposed purpose requirement in the Tribunal's discussion of defendant Rasche, 582 F.3d at 259, but here too, the Tribunal applied, and found satisfied, the *mens rea* of knowledge; Rasche was acquitted because his conduct did not satisfy the *actus reus*. 14 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 622.

Every subsequent international tribunal governed by customary international law has, after extensive review of post-World War II and other case law, applied a knowledge standard. This includes the International Criminal Tribunal for the former Yugoslavia,[10] which only applies rules that are "beyond any doubt customary law." *Prosecutor v. Tadić*, Opinion and Judgment, Case No. IT-94-1-T, ¶662 (May 7, 1997). It also includes the International Criminal Tribunal for Rwanda, *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Appeal Judgment, ¶501 (Dec. 13, 2004); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T,

---

[10] *See, e.g.*, *Prosecutor v. Popovic*, Case No. IT-05-88-A, Appeal Judgment, ¶ 1758 (Jan. 30, 2015); *Prosecutor v. Šainović*, Case No. IT-05-87-A, Appeal Judgment, ¶ 1649 (ICTY Jan. 23, 2014); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶245 (Dec. 10, 1998).

Judgment, ¶545 (Sept. 2, 1998), and the Special Court for Sierra Leone. *E.g. Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Appeal Judgment, ¶¶437, 446, 483 (Sep. 26, 2013). *See also John Doe I, et al. v. Nestle USA, et al.*, 766 F.3d 1013, 1023 (9th Cir. 2014) (citing many of these authorities).

The Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998), also allows for liability based on "knowledge." Article 25(3)(d)(ii) holds responsible anyone who contributes to the commission of a crime by a group acting with a common purpose if they have "knowledge" of the group's intent. Thus, where, as here, a defendant has aided group crimes, the Rome Statute prescribes a knowledge standard.

*Presbyterian Church of Sudan* relied on a concurrence in *Khulumani*, which looked to another Rome Statute provision, Article 25(3)(c). 582 F.3d at 259 (citing 504 F.3d at 276 (Katzmann, J., concurring)). That was error, and not just because Article 25(3)(d)(ii) recognizes culpability based on knowledge. The ATS applies customary international law. But the Rome Statute is a treaty that does not always reflect customary international law. Indeed, the Statute specifies, twice, that it does not limit international law rules that exist outside the Statute. Rome Statute. Arts. 10 & 22(3). Any argument that courts should look to the Rome Statute as a limit on customary international law is explicitly foreclosed by the Statute itself.

### D. Aiding and abetting requires substantial assistance, not but-for causation.

Arab Bank wrongly claims Plaintiffs must show that "the attacks in question would not have occurred but for the Bank's actions." Br. for Resp. in Opp. to *Cert.* at 35-36. Abetting's only causal link requirement is "substantial assistance." *See Halberstam*, 705 F.2d at 477. "But for" causation is not an element of the claim. *Linde v. Arab Bank*, PLC, 384 F. Supp. 2d 571, 584-85 (E.D.N.Y. 2005) (citing *Halberstam*, 705 F.2d at 477); *Aetna Cas. & Sur. Co. v. Leahey Const. Co.*, 219 F.3d 519, 537 (6th Cir. 2000) (assistance need only be substantial, not necessary to the tort). Indeed, both co-conspirators and abettors are jointly and severally liable. Restatement (Third) of Torts, Apportionment of Liability § 15 (2000). This is true without consideration of "but for" cause; the rule "refus[es] to let the individuals escape from liability by claiming that . . . they did not themselves cause the plaintiff's injury." *Id.* § 15, Reporter's Notes cmt. a.

So too in international law. The abettor must substantially assist the abuse, but need not cause it; his conduct need not be a "condition precedent" to the primary crime. *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 *28 (D.D.C. July 6, 2015) (collecting international law authorities); *accord Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, ¶ 576 (March 24, 2016) (holding it unnecessary to establish that the crime would not have been committed without the abettor's contribution); *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶391 (Feb. 22, 2001) ("The act of assistance need not

have caused the act of the principal."). Not surprisingly, the *Zyklon B* court rejected Tesch's plea for leniency on grounds that had he not provided poison gas to Auschwitz, the SS would have murdered Jews anyway. 1 Law Reports of Trials of War Criminals at 102.

* * *

The rule holding liable those who knowingly abet ordinary torts applies equally, and should not be watered down, when the abettor aids universally reviled atrocities. There is no reason to immunize a modern day Bruno Tesch, who provides genocidaires with the implements of death, knowing they would be used to kill. In these circumstances, our law, and our values, demand accountability. Civil liability is hardly too strict. Tesch, after all, was hanged. *Id.*

## CONCLUSION

Whether corporations can be sued under the ATS for committing or abetting atrocities is determined by federal common law. Centuries-old common-law principles subject corporations to the same tort liability as natural persons. Nothing in law or logic warrants a new, special immunity for corporations involved in the very worst kinds of torts.

Respectfully submitted,

RICHARD L. HERZ[11]
*Counsel of Record*
MARCO B. SIMONS
MARYUM JORDAN
TAMARA MORGENTHAU
EARTHRIGHTS INTERNATIONAL
1612 K Street, N.W. Suite 401
Washington, DC 20006
202-466-5188 (ph)
202-466-5189 (fax)
Counsel for *amici curiae*

June 27, 2017

[11] Based in CT; admitted in NY; does not practice in DC's courts.